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In The

Supreme Court of the United States

October Term, 1993

ESTHER A. GONZALES, LORENZO B. HOLGUIN, JR., RAUL HOLGUIN and GLORIA CISNEROS,

Petitioners,

vs.

RICHARD A. CARTER, D.O.
and
E.R. JOHNSON, D.O.,

Respondents.

On Petition For Writ Of Certiorari To The Second Court Of Appeals Fort Worth, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Were Petitioners denied equal protection of the laws by the trial court's finding that Respondents' race-neutral explanations for striking the only two Hispanic venirepersons on the jury panel was not pretexual although neither were posed individual questions by Respondents, are not identified in the voir dire record and any inquiry by Respondents that would have confirmed the basis for their strikes would have entitled them, under Texas law, to strikes for cause?

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Esther A. Gonzales, Lorenzo B. Holguin, Jr., Raul Holguin and Gloria Cisneros, Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Court of Appeals District, Fort Worth, Texas, entered in the above entitled case on June 9, 1993.

OPINION BELOW

The Opinion for the Court of Appeals for the Second Court of Appeals District, Fort Worth, Texas, is not reported and is printed in Appendix "A" hereto, infra, page 21. The Order of the Supreme Court of Texas denying Application for Writ of Error with the notation "Writ Denied", dated October 27, 1993 is attached hereto as Appendix "B", page 22.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Second Court of Appeals District, Fort Worth, Texas, was entered on June 9, 1993. A timely filed Application for Writ of Error to the Supreme Court of Texas was denied on October 27, 1993. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states, in pertinent part, as follows:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

This was a medical negligence action brought on behalf of Petitioners as a result of the death of their mother. After the jury was selected, but before it was empaneled and sworn, the Petitioners objected to the use by the Respondents of two of their total of six peremptory challenges to strike the only two veniremembers with Hispanic surnames.[1] Specifically, the Petitioners filed a challenge to the Respondents' use of the peremptory strikes under the civil equivalent of the *Batson* decision [SOF 1, 67]. The Respondents conceded that all of the Plaintiffs were of Hispanic origin [SOF 1, 71] and the Court took judicial knowledge that the number twelve juror had an Hispanic surname of Jimenez and that the number twenty-three juror had a Spanish surname of Ayala [SOF 1, 71]. At that time, the attorneys for Respondents, Carter and Johnson, John Scully and Max Freeman, respectively, were sworn and testified to the reasons that the peremptory strikes were utilized.

At no time during the voir dire did the Petitioners or Respondents ever question Stephen Ayala. In addition, he made no statement on the record for any purpose. According to Mr. Scully, his basis for striking Mr. Ayala was based on a statement asked by Mr. Freeman during voir dire as to whether or not if the Defendants established that they were not negligent in the case, the jurors

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[1] References in this brief are to the transcript [TR] followed by the page number and to the Statement of Facts [SOF] followed by the volume and page number. Parties and their counsel will be referred to by either individual names or collectively as "Petitioners" or "Respondents".

could write "no" in the jury special questions. Scully stated that "as I recall, Mr. Ayala did not raise his hand" [SOF 1, 73-74]. He also testified that he did not know that Mr. Ayala was Hispanic [SOF 1, 74]. Finally, he stated that Mr. Ayala acted favorably to questioning by Petitioners' counsel, but did not appear to favor Mr. Freeman's questioning [SOF 1, 75].

When Freeman testified, he recalled that he had asked a question about understanding the difference between real life and lawsuit damages and had remembered "those same jurors wouldn't raise their hand" [SOF 1, 77]. He further added that anything else he would say would be duplicative of what Mr. Scully said.

The record is clear that when Freeman asked the two questions, the panel's response elicited no follow-up questions of any kind to any of the panel members. After he asked the jury panel to raise their hands if they could write in "no" if the Petitioners would not bear the burden of proof, he responded simply "Okay" [SOF 1, 52]. His other question in regard to understanding the difference between real life and lawsuit damages elicited no response from him at all [SOF 1, 63].

The Respondents also struck juror number twelve, Yvette Jimenez Baker. The Court noted for the record that the juror information card was addressed to Yvette Jimenez, but at the time of trial, it was changed to show her married name, Yvette Baker [SOF 1, 71]. According to Mr. Scully's testimony, he utilized his peremptory strike against Mrs. Baker because she stated during voir dire that she attended medical classes and that she currently works at Northeast Medical Clinic where she works for

"M.D.'s, not D.O.'s" [SOF 1, 75]. Both of the Respondents were Doctors of Osteopathic Medicine and according to Mr. Scully, he was concerned about prejudice that a prospective juror would have who worked for a medical doctor or M.D. [SOF 1, 75]. Mr. Scully asked no questions of Mrs. Jimenez Baker in order to determine the existence of this prejudice. In addition, he testified that Mrs. Jimenez reacted favorably to Petitioners' counsel, but did not appear to favor Mr. Freeman's questioning [SOF 1, 75]. In his testimony, Freeman stated that both of the Hispanic veniremembers did not raise their hand when he asked them about the difference between real life and lawsuit damages [SOF 1, 77].

The voir dire record clearly reflects that neither of the Respondent's counsel proposed any questions to Stephen Ayala or to Yvette Jimenez Baker. It is undisputed that Stephen Ayala was never asked a question. An unidentified veniremember responded to a general question by Petitioners' counsel pertaining to the existence of any medical background or experience. This unidentified person stated that she worked at Northeast Medical Clinic and that her immediate supervisors were physicians who owned the clinic [SOF 1, 27]. When asked if her supervisors were M.D.'s, she replied "Gynecologists" [SOF 1, 28]. Nowhere in the record does she state that they were M.D.'s or D.O.'s. She further stated "I feel like I can be fair because I have some background . . . " When affirmatively asked if her experience would in any way affect her ability to serve as a juror on the case, she answered "No" [SOF 1, 27-28].

The juror information card for Yvette Jimenez Baker, reflects that she did work for the Northeast Medical

Clinic as an office clerk [TR. 189]. The juror information card for Stephen Ayala simply states that he is a 20 year old Postal employee born in Fort Worth [TR. 193]. But no information from the information card was utilized to serve as the basis for the Respondents' peremptory strike.

Neither of the Respondents' counsel was cross-examined by Petitioners' counsel and at the conclusion of their testimony, the trial court overruled the Petitioners' motion [SOF 1, 77].

On appeal after an adverse jury verdict, the Court of Appeals of the Second Court of Appeals District of Texas affirmed. The Court found that the trial court's ruling regarding the strike of Ayala was not clearly erroneous because counsel for both parties had relied on the "raise-your-hand type of questioning" and no evidence was offered to rebut the assertion that Stephen Ayala had failed to raise his hand.

The court also affirmed the trial court's ruling pertaining to Yvette Jimenez Baker, holding that the record supported the trial court's implied finding of no purposeful discrimination. The court alluded to the fact that a white veniremember who had served as a medic in Vietnam had been empaneled on the jury, but Jimenez-Baker had been stricken due to her medical experience. Although conceding that disparate treatment between minority and non-minority veniremembers is one factor in determining the existence of purposeful discrimination, the Court concluded that the medical services were dissimilar enough to overcome any suggestion of disparate treatment.

After the court overruled a timely filed Motion for Rehearing, the Petitioners applied for Writ of Error to the Supreme Court of Texas, which was denied by Order dated October 27, 1993.

REASONS FOR GRANTING THE WRIT

I.

UNDER STANDARDS CREATED BY STATE COURTS THROUGHOUT THE COUNTRY TO DETERMINE THE LEGITIMACY OF RACE-NEUTRAL EXPLANATIONS JUSTIFYING THE STRIKING OF MINORITY VENIREPERSONS, THE TRIAL COURT'S FINDING OF NO DISCRIMINATION IS CLEARLY ERRONEOUS.

The Fourteenth Amendment to the United States Constitution prohibits either a civil or criminal litigant from exercising peremptory challenges for racially motivated reason, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), *Edmonson v. Leesville Concrete Co.*, ___ U.S. ___, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

In *Batson*, this court outlined a three-step process for evaluating claims that a litigant has utilized peremptory challenges in a manner violating the equal protection clause. First, the moving party must make a prima facie showing that a litigant has exercised peremptory challenges on the basis of race; if the requisite showing has been made, the burden shifts to opposing counsel to articulate a race-neutral explanation for striking the jurors in question; the trial court must then determine whether the moving party has carried his burden of proving purposeful discrimination, *Batson v. Kentucky*,

476 U.S. 79, 96-98 (1986). Appellate review of a trial court's adjudication of no discriminatory intent is based on a "clearly erroneous" standard, *Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859, 1871, 114 L.Ed.2d 395, 411 (1991).

After the decision in *Batson*, state courts began to develop criteria in order to determine if a party's explanation for striking a minority veniremember was genuine or based on "sham excuses belatedly contrived to avoid admitting acts of group discrimination", *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748, 768 (1978). The courts soon recognized that all race-neutral justifications cannot be accepted on their face without further examination into the context of the peremptory challenge.

> *Batson* also implicitly approves inquiry into the legitimacy of the explanations because otherwise *Batson* would become a right without a remedy. "Rubber stamp approval" of all nonracial explanations, no matter how whimsical or fanciful, would cripple *Batson's* commitment to "insure that no citizen is disqualified from jury service because of race". *Batson*, 106 S.Ct. at 1723. Without some form of inquiry, a prosecutor could easily conceal his true reason for removing black jurors by simply inventing "neutral" reasons for the strikes. *Batson*, 106 S.Ct. at 1728 (Marshall, J., concurring) . . . *Batson* surely cannot be read to produce such an anomalous result. *State v. Butler*, 731 S.W.2d 265 (M.O. App. 1987).

Utilizing as a foundation the admonition in *Batson* that the offending party must articulate legitimate reasons which are clear and reasonably specific and are

related to the particular case to be tried, state courts began to develop criteria that would focus directly on the legitimacy of race-neutral explanations. One of the first decisions to formulate such standards was *Slappy v. State*, 503 So.2d 350 (Fla. App. 3 Dist. 1987), aff'd, 522 So.2d 18 (Fla.), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988). The following five factors were determined to weigh heavily against the legitimacy of a professed justification to strike a minority venireperson:

1. An explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically;

2. No examination or only a perfunctory examination of the challenged juror;

3. Disparate examination of the challenged juror, i.e. questioning challenged venireperson so as to evoke a certain response without asking the same question of other panel members;

4. The reason given for the challenge is unrelated to the facts of the case; and

5. Disparate treatment where there is no difference between responses given to the same question by challenged and unchallenged venirepersons. *id.* 503 S.W.2d at 355.

In accepting the appellate court's criteria, the Florida Supreme Court ruled that reasonableness of a prosecutor's explanation alone is not enough to overrule a *Batson* challenge since a second factor must be involved – records support for the reasons given, *id.*, 522 So.2d at 23 (Fla. 1988).

In *Ex Parte Branch*, 526 So.2d 609 (Ala. 1987), the Alabama Supreme Court, after reviewing *Batson* issues in other states, formulated the following guidelines which it stated were illustrative of the types of evidence that could be used to raise the inference of discrimination:

1. Evidence that jurors in question shared only one characteristic – their membership in the group – and that in all other respects, they were heterogeneous as the community as a whole;

2. A pattern of strikes against black or minority jurors on the particular venire;

3. The past conduct of the State's attorney in using peremptory challenges to strike all blacks;

4. The type and manner of the State's attorney questions and statements during voir dire including nothing more than desultory voir dire;

5. The type of manner and questions directed the challenged juror, including a lack of questions or a lack of meaningful questions;

6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner;

7. Disparate examinations of members of the venire; for example, a question designed to provoke a certain response that is likely to disqualify a juror;

8. Circumstantial evidence of intent may be proven by disparate impact where all or

most of the challenges were used to strike blacks from the jury;

9. The state used peremptory challenges to dismiss all or most black jurors. *id.* 526 So.2d 622-623.

Similar standards have been utilized in California, see e.g. *People v. Turner*, 42 Cal.3d 711, 726 P.2d 102 (1986); *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748 (1978).

In this case, three of the four factors that the Florida court found to weigh heavily against the legitimacy race-neutral explanations were present. First, there was no individual examination by Respondents of either of the Hispanic venirepersons struck by Respondents. Indeed, Stephen Ayala was not asked a question by either party or the court and neither of the potential jurors are identified by name in the voir dire record. Secondly, the reason given for striking Yvette Jimenez Baker – that she would be prejudiced against doctors of osteopathy because she worked for M.D.'s – is a classic example of an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically. Thirdly, Mrs. Jimenez-Baker was struck when a former army medic was empaneled on the jury which constitutes disparate treatment when there was no difference between responses in regard to medical background. More importantly, and in line with the decision of the Florida Supreme Court, there is no voir dire record to substantiate the common basis for striking both Hispanics – that they were the only two people in the jury panel who refused to raise their hand in response to questions as to whether or not they could be fair and impartial.

Likewise, the facts of this case establish the presence of five of the nine factors mentioned by the Alabama Supreme Court in *Branch:* a lack of questions; all of the potential Hispanic jurors were stricken; disparate impact where most of the challenges were used to strike all of the Hispanic jurors; a pattern of strikes against Hispanic jurors; evidence that the jurors in question shared only one characteristic – and that in other respects, they were heterogeneous as a community.

In *Hernandez v. New York,* 111 S.Ct. 1859 (1991), this court affirmed a state court's overruling of a *Batson* challenge because it found that the trial court did not commit clear error in choosing to believe the reasons given by the prosecutor. However, it left open a situation in which minorities were struck "without regard to the particular circumstances of the trial or the individual responses of the jurors", *id.* 111 S.Ct. at 1873. It is submitted that that case is now before this Court.

II.

UNDER STANDARDS ADOPTED BY TEXAS COURTS IN CRIMINAL CASES TO DETERMINE THE LEGITIMACY OF RACE-NEUTRAL EXPLANATIONS JUSTIFYING THE STRIKING OF MINORITY VENIREPERSONS, THE TRIAL COURT'S FINDING OF NO DISCRIMINATION IS CLEARLY ERRONEOUS.

In *Powers v. Palacios,* 813 S.W.2d 489 (Tex. 1991), the Texas Supreme Court, in the face of *Edmonson,* held that civil litigants cannot exercise peremptory challenges for racially motivated reasons, but did not offer any guidance to the lower court as to how to enforce its holding.

After *Batson*, the Texas Code of Criminal Procedure was amended to incorporate the holding, Tex. Code Crim. Proc. Ann. art. 35.261 (Vernon 1989).

In *Whitsey v. State*, 796 S.W.2d 710 (Tex. Crim. App. 1989), the Texas Court of Civil Appeals adopted the five factors earlier delineated by the Florida Appellate Court in *Slappy* which weigh against the legitimacy of a race-neutral explanation. According to the Court, the existence of any one of these factors tends to show that the striking party's reasons are not supported by the record or are an impermissible pretext, *id.* 796 S.W.2d at 713-714.

Although the Texas Supreme Court has never adopted these standards for use in civil cases, they were specifically utilized by the Second Court of Appeals in *Lott v. City of Fort Worth*, 840 S.W.2d 146, 151 (Tex. Civ. App. – Ft. Worth 1992, no writ). Yet, for reasons not explained in the opinion, the lower court chose not to analyze the facts of this case utilizing the *Whitsey – Slappy* criteria. If it had, it would have found that three of the five factors that tend to show the striking parties reasons are not supported by the record or are an impermissible pretext are present in this case.

As has already been stated, for reasons not apparent in the record, counsel for Respondents chose not to ask either of the challenged jurors any questions. In *Lott*, the potential jurors' answers to voir dire were considered "essential" to the Court of Appeals determination of a *Batson* challenge, *id.* 840 S.W.2d at 152. Texas criminal courts have found that this is one of the most important factors in reviewing a *Batson* challenge on appeal. For example, in *Estevez v. State*, 849 S.W.2d 822 (Tex. Crim.

App. 1993), the Court of Civil Appeals, sitting en banc, reversed an Appellate Court's review of a *Batson* challenge because the court failed to take into consideration the lack of questions posed to veniremembers who were struck through peremptory challenges. The court ruled that the majority opinion of the Appellate Court did not consider the relevant evidence because it did not take into account "the lack of questions directed at the challenged veniremember". In *Lewis v. State*, 779 S.W.2d 449 (Tex. Civ. App. – Tyler 1989), the Court found that the lack of any meaningful examination of an Afro-American juror who said that he knew one of the state's witnesses from another case resulted in a failure to rebut a presumption of racial discrimination.

Although counsel for each respondent participated in the voir dire process by asking both general and individual questions, neither posed any questions to the two jurors with Hispanic surnames who were struck. Neither of these Hispanic veniremembers are identified by name in the voir dire record. Indeed, it is undisputed that juror Stephen Ayala was struck by Respondents even though he was never asked a question by any party to the litigation. According to Mr. Scully, the reason Ayala was struck was because he refused to raise his hand when Freeman had asked a question as to whether or not the jurors could write in "no" in the jury's special questions if the Petitioners had not proved Drs. Johnson or Carter were negligent. According to Mr. Scully, this made him suspicious of "motivations and . . . possible prejudice . . . " [TR. 1, 73]. When Freeman testified as to the reasons for the use of his peremptory strikes against Ayala and Jimenez-Baker, he stated:

> I would further state that in addition to the questions Mr. Scully mentioned where I held up the jury charge and asked if the Plaintiffs failed to meet the burden of proof, could they write in "no", that those same jurors wouldn't raise their hand when I ask them about the difference between real life and lawsuit damages, and that additionally caused my concern [TR. 1, 77].

In other words, although not identified in the record or asked any question by Respondents' counsel, Ayala and Jimenez-Baker were ostensibly struck because it was felt that they would refuse to follow the court's instructions and the law and, therefore, were biased against Respondents. Yet, neither of Respondents' counsel posed one question to Ayala or Jimenez-Baker in order to confirm those suspicions of bias.

Under Texas law, bias or prejudice disqualifies a juror as a matter of law and removes all discretion from the trial court, *Carpenter v. Wyatt Construction Co.*, 501 S.W.2d 748 (Tex. Civ. App. – Houston 1973). In addition, any effort to rehabilitate a juror who was found to have bias or prejudice is of no avail because any affirmation by the potential juror that he can set aside and try the case fairly upon the laws and evidence should be disregarded, *Gun v. Schaeffer*, 683 S.W.2d 803 (Tex. Civ. App. – Corpus Christi 1984). Therefore, had counsel for Respondents asked any questions that would have confirmed intentional failure of either of the Hispanic veniremembers to raise their hands on the basis of those questions posed by the Respondents' counsel, they would have automatically been entitled to strike the same veniremembers for cause. Yet, they chose to pose no questions to those potential

jurors and instead utilized their peremptory challenges to remove them from the jury.

In *Estevez v. State,* 845 S.W.2d 291 (Tex. Civ. App. – Houston 1992) *vacated and remanded* 849 S.W.2d 822 (Tex. Crim. App. 1993), a prosecutor had testified that she had struck a potential juror because she thought the veniremember was either a potential witness in the case or a member of the defendant's family. The prosecutor posed no question to this individual to confirm her suspicions. While the Court of Appeals affirmed the trial court's finding of no discrimination, the dissent argued that the court failed to consider the lack of questions by the prosecutor:

> "Here, the prosecutor had no excuse not to question the juror because, if the suspicions were verified, the prosecutor could have challenged *Ross* for cause, *id.* 845 S.W.2d at 300."

If counsel for Respondents in this case actually believed that the only two Hispanic venirepersons intentionally failed to raise their hand when general questions were posed to the entire panel in regard to their ability to follow the court's instructions, they could have easily confirmed those suspicions by asking individual questions to the minority jurors and then utilizing strikes for cause to remove them from the panel. Yet, they chose to do the opposite – ask no questions at all of those potential jurors and utilize one-third of their entire strikes to remove them from the panel through peremptory challenges.

According to sworn testimony, counsel for Respondents made two assumptions in regard to Yvette Jimenez

Baker that justified their use of a peremptory strike. First, they assumed that she worked for medical doctors as opposed to osteopaths, yet that assumption is not supported by the record. In addition, they assumed that she would be prejudiced against osteopaths because she worked for medical doctors. While assuming, for the sake of argument, that such a bias might exist, it is clear that the attorneys chose not to ask any questions in order to determine if Mrs. Jimenez-Baker specifically possessed such a bias. This represents a second *Whitsey – Slappy* factor in that it constitutes an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically.

Lastly, Mrs. Jimenez-Baker was struck, according to counsel for Respondents, because of her medical experience and background. Although she is not identified in the voir dire record, another white veniremember testified in the record that he was a medic in Vietnam, but he was not struck by the Respondents and was empaneled on the jury. This constitutes a third *Whitsey – Slappy* factor present in the case. Finally, the reasons given by Respondents' counsel in exercising the peremptory strikes cannot be supported by the record because there is no record to support it. Because the explanations given by counsel constitute valid reasons, under Texas law, to remove potential jurors for cause, there is no justification for the absence of such a record. To the contrary, it is submitted that the decision in *Batson* and the principals underlying the Equal Protection Clause of the Fourteenth Amendment requires such a record.

CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Court of Appeals of the Second Court of Appeals District of Texas. In the event that the petition is granted, the Petitioners pray that judgment of the court below be reversed, that this cause be remanded to the District Court for trial on the merits.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT OF APPEALS OF THE SECOND COURT OF APPEALS DISTRICT OF TEXAS OF JUNE 9, 1993

NO. 2-92-246-CV

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

ESTHER A. GONZALES, LORENZO B. HOLGUIN, JR., RAUL HOLGUIN AND GLORIA CISNEROS — APPELLANTS

VS.

RICHARD A. CARTER, D.O. AND E.R. JOHNSON, D.O. — APPELLEES

FROM THE 48TH DISTRICT COURT OF TARRANT COUNTY

OPINION

This is a medical malpractice case. Appellants, the adult children of Jane Holguin, brought a wrongful death action against appellees, two physicians who treated their mother. Judgment was entered in accordance with the jury verdict in which the jury failed to find that appellees were negligent or that their conduct was a proximate cause of Holguin's injuries.

We affirm.

BATSON CHALLENGE

Appellant's first, second, and third points of error assert that the State exercised peremptory challenges against two allegedly Hispanic veniremembers for racially discriminatory reasons in contravention of *Batson*

v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and its progeny. The exercise of peremptory challenges on the basis of a veniremember's race is prohibited in civil, as well as criminal, litigation. *Edmonson v. Leesville Concrete Co., Inc.*, ___ U.S. ___, 111 S.Ct. 2077, 2088, 114 L.Ed.2d 660, 680 (1991); *Powers v. Palacios*, 813 S.W.2d 489, 491 (Tex. 1991). The same analytical methodology applies to such challenges in both the civil and criminal contexts. *See Lott v. City of Fort Worth*, 840 S.W.2d 146, 149 (Tex.App. – Fort Worth 1992, no writ).

After the jury was selected, but before it was empaneled, the appellants objected to the appellees' use of peremptory challenges to remove two persons with Hispanic surnames, Steven Ayala and Yvette Jimenez Baker[1], from the jury venire. Without making an express finding of purposeful discrimination, the trial court offered the appellees' attorneys an opportunity to explain their reasons for striking Ayala and Jimenez Baker. Two of appellees' attorneys were sworn and stated their reasons for exercising peremptory challenges against these veniremembers.

The raise a *Batson* challenge, the moving party must first make a prima facie showing of the nonmovant's discriminatory use of peremptory challenges. The burden then shifts to the nonmovant to give a race-neutral explanation for the peremptory challenges.

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[1] The record reflects that Ms. Jimenez Baker's juror information card was addressed to "Yvette Jimenez", but at the time of trial, it was changed to show here married name of "Yvette Baker." She will be referred to as "Jimenez Baker" in this opinion.

Appellees assert that the appellants never made a prima facie showing of racial discrimination because the record does not reflect that Ayala and Jimenez Baker were members of a cognizable racial group. The trial court took judicial notice that "Ayala" and "Jimenez" were Hispanic surnames; however, the race or ethnic origin of a veniremember cannot be conclusively proven for purposes of a *Batson* hearing based solely upon the person's surname. *Rodriguez v. State*, 819 S.W.2d 920, 926 (Tex.App. – Houston [14th Dist.] 1992, no writ); *Sanchez v. State*, 797 S.W.2d 951, 956 (Tex.App. – Dallas 1990, no writ). John Scully, attorney for appellee Carter, testified at the *Batson* hearing that he did not know Mr. Ayala was Hispanic. The record is otherwise devoid of evidence establishing the race of veniremembers Ayala and Jimenez Baker. Nevertheless, we find that appellees waived the argument that appellants did not make a prima facie case. When the nonmovant does everything that would be required of him if the movant had properly made out a prima facie case, the issue of whether the movant actually make a prima facie case becomes moot. *Dewberry v. State*, 776 S.W.2d 589, 591 n.2 (Tex.Crim.App. 1989); *Reich-Bacot v. State*, 789 S.W.2d 401, 403 Tex.App. – Dallas 1990, pet. dism'd, improvidently granted). The appellees came forward, albeit voluntarily, with explanations for striking Ayala and Jimenez Baker. By doing so, appellees did everything that would have been required of them had appellants made a prima facie case of purposeful discrimination.

We next turn to the explanations offered for the contested strikes to determine whether they were race-neutral. No direct questions were asked of Ayala during the

voir dire examination. The attorneys for both sides used numerous questions addressed to the venire in which veniremembers were asked to respond by raising their hands. Appellees explained that they struck Ayala because he did not raise his hand in response to two such questions. Specifically, appellees claim that Ayala did not raise his hand when the venire was asked if they could write in "no" if they found that the appellees were not negligent and if they understood the difference between real life damages and lawsuit damages. Appellees' attorneys were not cross-examined about their proffered race-neutral reasons for striking Ayala, and appellants did not present any rebuttal evidence. Appellants assert on appeal that the reasons for striking Ayala are not supported by the record.

Appellate review of *Batson* issues follows the "clearly erroneous" standard to determine whether the trial judge's findings of fact are adequately supported by the record. *Salazar v. State*, 818 S.W.2d 405, 408 (Tex.Crim.App. 1991). The reviewing court must analyze the decision of the trial court by reviewing the record in its entirety, considering the entire voir dire process and the racial makeup of the venire, the nonmovant's explanations and the movant's rebuttal and impeachment evidence. *Vargas v. State*, 838 S.W.2d 552, 554 (Tex.Crim.App. 1992). In so doing, the reviewing court must consider the evidence in the light most favorable to the trial judge's ruling. *Salazar*, 818 S.W.2d at 408.

We find that Ayala's nonverbal responses, as conveyed by not raising his hand, were sufficiently supported by the record in this case, especially since appellants' attorney did not dispute appellees' reasons

for striking Ayala. This situation is distinguishable from those cases in which the record shows the veniremember's response to be different from the characterization given it by the nonmoving party when articulating race-neutral reasons for exercising peremptory challenges. The trial judge, as supervisor of the voir dire, is in a position to readily perceive discrepancies during the jury selection process. *Vargas,* 838 S.W.2d at 554. Considering the evidence in the light most favorable to the trial court's implied finding of no purposeful discrimination, we are not convinced that the trial court's ruling regarding the strike of Ayala was "clearly erroneous" because counsel for both parties relied on raise-your-hand type questioning and no evidence was offered to rebut the assertion that Ayala failed to raise his hand in response to certain questions.

The appellees' attorneys explained that they struck Jimenez Baker because she attended medical classes and because "she works for M.D.s not D.O.s." Both of the appellees are doctors of osteopathic medicine, and their attorney explained that he was concerned about a prospective juror who worked for medical doctors. The record reflects that when Jimenez Baker was questioned during the voir dire examination about whether she worked for M.D.s, she responded "Gynecologists." Although the record contains no evidence that Jimenez Baker's employers were medical doctors, we believe the record adequately supports the trial court's implied finding of no purposeful discrimination as to the strike against Jimenez Baker. A faulty recollection of a voir dire exchange or an understandable confusion does not rise to the level of showing of a pretext for discrimination. *Reich-*

Bacot, 789 S.W.2d at 403. Moreover, appellant's attorney did not challenge the M.D. characterization.

Appellants also argue that disparate treatment of Hispanic and non-Hispanic veniremembers occurred because Jimenez Baker was stricken due to her medical experience, but a white veniremember who had served as a medic in Vietnam was nor stricken. Disparate treatment between minority and nonminority veniremembers is one factor to be considered in determining whether purposeful discrimination occurred. *Lott*, 840 S.W.2d at 151. The medical experiences of Jimenez Baker and the Vietnam medic were dissimilar enough to overcome any suggestion of disparate treatment.

Because we are not left with a definite and firm conviction that a mistake has been committed, *Whitsey v. State*, 796 S.W.2d 707, 728 (Tex.Crim.App. 1989), points of error one, two and three are overruled.

EXCLUSION OF EVIDENCE

Appellants' fourth point of error complains of the trial court's exclusion of the cause of death from a certified copy of a death certificate. Appellants offered Holguin's death certificate which had been certified by the local registrar of the Dallas Health Department. Appellees objected to the language on the death certificate stating the cause of Holguin's death on the grounds that the death certificate contained hearsay, the coroner who signed the death certificate had not been identified as an expert witness, and the factual statements made in the death certificate were made by someone who had not been identified as a person having knowledge of relevant

facts. The trial court sustained the objection and ordered the cause of death to be redacted from the death certificate before its admission into evidence.

Although TEX. R. CIV. EVID. 803(8) and 803(9) except public record and reports and records of vital statistics from the hearsay rule, they do not authorize the admission of ex parte statements, hearsay, conclusions and opinions contained in such reports or records. *See Wright v. Lewis*, 777 S.W.2d 520, 524 (Tex.App. – Corpus Christi 1989, writ denied). Moreover, opinion or conclusory statements on death certificates cannot be used as evidence to prove the cause of death. *Employers Mut. Liab. Ins. Co. of Wisconsin v. Hunter*, 503 S.W.2d 820, 822 (Tex.Civ.App. – Beaumont 1973, writ ref'd n.r.e.); *Armstrong v. Employers Casualty Co.*, 357 S.W.2d 168, 171 (Tex.Civ.App. – Waco 1962, no writ). We find that the trial court did not err in omitting the cause-of-death language from the death certificate. Furthermore, even had the trial court erred in doing so, the error would have been harmless because the excluded evidence was cumulative of other identical cause-of-death testimony admitted through the autopsy report and the testimony of two physician witnesses. Point of error four is overruled.

SUFFICIENCY OF THE EVIDENCE

Appellants' remaining points of error challenge the legal and factual sufficiency of the evidence. Both points of error assert that the trial court erred in denying appellants' motion for new trial. In point of error five, appellant claims there was no evidence, or alternatively, insufficient evidence, to support the jury's answer of

"no" to jury question number one pertaining to negligence and proximate cause. Likewise, point of error six alleges that there was no evidence, or alternatively, insufficient evidence, to support the jury's answer of "no" to jury question number four pertaining to Dr. Carter's abandonment of Holguin.

Appellants failed to preserve their legal sufficiency arguments. "No evidence" points must be preserved through one of the following procedural steps in the trial court: (1) a motion for instructed verdict; (2) a motion for judgment notwithstanding the verdict; (3) an objection to the submission of the issue to the jury; (4) a motion to disregard the jury's answer to a vital fact issue; or (5) a motion for new trial. *Salinas v. Fort Worth Cab & Baggage Co., Inc.*, 725 S.W.2d 701, 704 (Tex. 1987); *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985). Appellants filed a motion for new trial, but failed to raise a legal sufficiency objection in that motion.

Appellants also failed to preserve their factual sufficiency argument as to point of error six. Appellants' motion for new trial did not specifically address the jury's answer of "no" to question number four which asked "[w]as the abandonment, if any, by Richard A. Carter, D.O. a proximate cause of the occurrence?" Instead, the motion for new trial contained a general objection "that the evidence is factually insufficient to support the jury finding to every question to which they [the jury] answered 'No.' " One general assignment of error in a motion for new trial as to the sufficiency of the evidence to support numerous questions preserves no error for appeal. *Lee v. Andrews*, 545 S.W.2d 238, 247 (Tex.Civ.App. – Amarillo 1976, writ dism'd); *Diaz v.*

Deavers, 574 S.W.2d 602, 605 (Tex.Civ.App. – Tyler 1978, writ dism'd w.o.j.). The jury answered "No" to questions one, four and five, and as a result, were not required to answer the remaining jury questions. However, the motion for new trial addressed only the factual sufficiency of the evidence to support the jury's answer to question one. We find that the motion for new trial did not raise the issue of factual sufficiency as to question four and, accordingly, appellants failed to preserve this complaint for appeal. Point of error six is overruled.

Appellants' motion for new trial challenged the factual sufficiency of the evidence to support the jury's answer to jury question number one which asked "[d]id the negligence, if any, of those named below proximately cause the occurrence in question?". Following the question, the names of appellees, Drs. Carter and Johnson, as well as that of Jane Holguin, were listed. The jury answered "No" as to each person named. Appellants assert that this jury finding is against the great weight and preponderance of the evidence.

In reviewing a point of error asserting that a finding is "against the great weight and preponderance" of the evidence, we must consider and weigh all of the evidence, both the evidence which tends to prove the existence of a vital fact as well as evidence which tends to disprove its existence. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam); *Ford Motor Co. v. Nowak*, 638 S.W.2d 582, 585 (Tex.App. – Corpus Christi 1982, writ ref'd n.r.e.). So considering the evidence, if a jury finding is so contrary to the great weight and preponderance of the evidence as to manifestly unjust, the point should be sustained, regardless of whether there is some evidence

to support it. *Watson v. Prewitt*, 159 Tex. 305, 320 S.W.2d 815, 816 (1959) (per curiam); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (1951) (per curiam).

The undisputed evidence establishes that Jane Holguin was injured when she opened a closet door and a suitcase fell on her arm. Four days later, Holguin consulted her family physician who referred her to Dallas/Fort Worth Medical Center in Grand Prairie. Holguin was ultimately treated there by appellees Dr. Carter, a surgeon, and Dr. Johnson, an endocrinologist. Dr. Carter performed two debridements on the injured arm. He also performed a skin graft, taking skin from the left thigh and grafting it onto the right upper arm. Dr. Johnson was not involved in the treatment of the graft or donor site. Dr. Johnson was brought in to consult because Holguin had previously been diagnosed as having Addison's disease. Dr. Johnson conducted tests that confirmed Holguin did not have Addison's disease, but instead she had panhypopituitarism, and he adjusted her medication to address this condition. Dr. Carter arranged for Holguin to consult with a plastic surgeon at John Peter Smith Hospital in Fort Worth; however, the plastic surgeon at John Peter Smith Hospital could not treat Holguin because Holguin was a Dallas County resident. Therefore, personnel at John Peter Smith Hospital arranged for Holguin to be transferred to Parkland Hospital in Dallas. Neither Dr. Carter nor Dr. Johnson saw Holguin after she left Dallas/Fort Worth Medical Center. Holguin was treated at Parkland Hospital for several days until her death.

Appellants assert that Holguin died from an infection at the donor wound site, and that appellees were negligent in failing to diagnose or treat the infection. Appellees contend that Holguin suffered a heart attack as a result of an overdose of the drug Decadron administered at Parkland Hospital.

Extensive testimony concerning the alleged infection at the donor wound site was offered by appellants and appellees. Appellants presented two expert witnesses, Dr. Norton, a pathologist, and Dr. Christ, a plastic surgeon, who both testified that Holguin developed infection in the donor wound site. Neither Dr. Norton nor Dr. Christ treated Holguin before her death. Conversely, appellees presented the testimony of both appellee doctors, as well as that of other treating doctors and a nurse at Dallas/Fort Worth Medical Center. All of Holguin's treating doctors, including appellees, testified that there was no infection at the donor wound site. Medical records from all three hospitals were admitted into evidence.

Findings of fact are the exclusive province of the jury. *Bellefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 744-45 (Tex. 1986). From our review of the evidence, we are not convinced that the jury's finding was against the great weight and preponderance of the evidence, manifestly unjust, shocking to the conscience, or clearly biased. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (opinion on reh'g). Point of error five is overruled.

The judgment of the trial court is confirmed.

/s/ H. Tod Weaver
H. TOD WEAVER
JUSTICE

PANEL A
WEAVER, HICKS AND FARRAR, JJ.
DO NOT PUBLISH
TEX. R. APP. P. 90(c)
JUN 9 1993

APPENDIX B

ORDER OF THE SUPREME COURT OF TEXAS DENYING APPLICATION FOR WRIT OF ERROR DATED OCTOBER 27, 1993

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 27, 1993

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RE: Case No. D-4130

Style: ESTHER A. GONZALES, LORENZO B. HOLGUIN, JR., RAUL HOLGUIN and GLORIA CISNEROS

v. RICHARD A. CARTER, D.O., and E.R. JOHNSON, D.O.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Respectfully Yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey,
Deputy Clerk